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BRIEF.

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In The
Supreme Court of the United States

JOSEPH P. MURR ET AL.,

Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of Wisconsin, District III

BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS JOSEPH P. MURR ET AL.

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INTEREST OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million businesses and professional organizations of every size. The Chamber routinely advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases implicating issues of vital concern to the nation's business community. This case is of significant interest to the Chamber because it calls on this Court to address the extent to which the United States Constitution safeguards private property rights against intrusive government regulations.

The Fifth Amendment provides that private property shall not be taken without just compensation, and "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking" for which the government owes compensation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 413-15 (1922). But lower courts today are muddled over how to address such regulatory takings. The appellate court below found no compensable taking of

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[1] This brief was authored by *amicus curiae* and its counsel, and was not authored in whole or in part by counsel for a party. No one other than *amicus curiae*, its members, or its counsel has made any monetary contribution to the preparation or submission of this brief. All parties provided blanket written consent to the filing of *amicus curiae* briefs, and this written consent is on file with this Court.

one parcel of land here for the arbitrary and ad hoc reason that petitioners also owned the adjoining parcel of land.

This case is important to property owners, including the Chamber's members, who have an interest in ensuring that the Fifth Amendment's Takings Clause continues to safeguard traditional forms of property ownership in the United States.

SUMMARY OF ARGUMENT

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 123-24 (1978), this Court declined "to develop any 'set formula' for determining" when a governmental regulation amounts to a taking under the Fifth Amendment. Instead, the Court decided that this determination of whether a regulation had gone too far, and thereby stepped over the constitutional line set by the Fifth Amendment, should be made via "ad hoc, factual inquiries" through a multi-factor balancing test. *Id.* at 124.

For decades since *Penn Central*, this Court has followed a "'polestar'" of ad hoc adjudication for "partial regulatory takings," *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 & n.23 (2002) (citation omitted), "plung[ing]" the Court's takings jurisprudence "into conceptual darkness" in the form of a "mushy balancing test" that throws any number of facts "into the hopper to determine whether any compensation is owed at all," Richard A. Epstein, *The Takings Clause and Partial Interests in Land: On*

Sharp Boundaries and Continuous Distributions, 78 Brook. L. Rev. 589, 596, 608 (2013). The resulting confusion has served to embolden regulators to pursue rights-restricting policies. *See, e.g.*, Gideon Kanner, *Making Laws and Sausages: A Quarter-Century Retrospective on* Penn Central Transportation Co. v. City of New York, 13 Wm. & Mary Bill Rts. J. 679, 681 (2005).

Among the greatest mysteries fostered by this ad hoc approach is how to define the unit of property against which the *Penn Central* balancing test's factors must be measured. According to *Penn Central*, takings jurisprudence "does not divide a single parcel into discrete segments," and the *Penn Central* balancing test instead focuses on the property owner's "parcel as a whole." 438 U.S. at 130-31. Consequently, because the *Penn Central* factors require courts "to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions" that must be answered in order to apply the balancing test "is determining how to define the unit of property 'whose value is to furnish the denominator of the fraction'"—a unit of property this Court called the "'*parcel as a whole.*'" *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (citations omitted).

But the Court "has provided little guidance as to what constitutes a 'parcel as a whole,'" especially in the context of physical lots of land that can be identified on a map. John E. Fee, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1537 n.7, 1544 (1994) [hereinafter Fee, *Unearthing the Denominator*]. In the absence of meaningful guidance

from this Court, lower courts disagree over how to define the relevant parcel of property, Pet. 17-20—a definition that can often be outcome determinative under the balancing test, Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 Penn. St. L. Rev. 601, 631 (2014) [hereinafter Eagle, *Takings Test*].

Thus, what constitutes the parcel as a whole has remained a "difficult, persisting question" to this day, *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001), with enormous "uncertainty" generated due to "inconsistent pronouncements by the Court" on this issue, *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). The Court's failure to provide consistent, meaningful guidance on how to define the "parcel as a whole" has been evident across the full spectrum of property rights—from air rights, *Penn Central*, 438 U.S. at 129-31, to mining rights, *Keystone*, 480 U.S. at 496-99, to personal property, *Andrus v. Allard*, 444 U.S. 51, 54, 64-66 (1979), and to a temporal interest in developing land during a 32-month moratorium on development, *Tahoe-Sierra*, 535 U.S. at 306, 321-32, to name just a few examples. Because of the lack of clear guidance from this Court, the lower courts all too often engage in an overly-complicated and rights-restrictive "balancing" in regulatory takings cases.

This case presents the Court with an opportunity to move toward a less ad hoc definition of the "parcel as a whole." The Court should adopt a clear test defining the relevant parcel of a physical tract as an identifiable segment of land that, but for the challenged regulation, would have at least one

economically viable use when considered independent of the surrounding tracts—an objective standard far different from the arbitrary and discriminatory one employed by the Court of Appeals of Wisconsin in this case. At the very least, the Court should hold that where the same person owns two adjoining tracts of land and treats those tracts as distinct parcels of property, the relevant parcel is the one tract that was taken due to the regulatory scheme rather than both lots—a standard that comports with this Court's historical focus on landowners' understanding of their property rights.

ARGUMENT

I. *PENN CENTRAL*'S MULTI-FACTOR TEST FOR PARTIAL REGULATORY TAKINGS HAS FOSTERED INCONSISTENT TAKINGS JURISPRUDENCE.

"For the Framers of our Constitution, the principles of good government started with the protection of private property—that guardian of all other rights." Richard A. Epstein, *The Ebbs and Flows in Takings Law: Reflections on the* Lake Tahoe *Case*, 2002 Cato Sup. Ct. Rev. 5, 5 (2001-2002) [hereinafter Epstein, *Ebbs and Flows*]. Among these protections, the Fifth Amendment's Takings Clause guarantees "that private property shall not be taken for a public use without just compensation," *Armstrong v. United States*, 364 U.S. 40, 49 (1960), thereby guarding against the "natural tendency of human nature" to seize more and more private property through the

exercise of the government's "police power," *Pa. Coal Co.*, 260 U.S. at 415. The Takings Clause has therefore served as one of the foundations for our nation's political stability. Epstein, *Ebbs and Flows*, *supra*, at 5.

For much of its initial history, there was relatively little debate about the meaning of the Takings Clause. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1009 (2003) [hereinafter Fee, *Comparative Right*]. This changed with the rise of modern government, *id.*, as governmental regulation sharply increased in the late nineteenth century and in the twentieth century, Steven J. Eagle, Penn Central *and Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 9-14 (2014).

Confronted with this flood of ever-growing regulatory laws, this Court warned that "[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change," and thus explained that "if regulation goes too far it will be recognized as a taking" under the Fifth Amendment. *Pa. Coal Co.*, 260 U.S. at 415-16. Ever since, this Court has struggled with "how to discern how far is 'too far.'" *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

In *Penn Central*, the Court stated that it was "unable to develop any 'set formula' for determining" when a regulation amounts to a taking under the Fifth Amendment, and insisted that this determination must be made through "essentially ad hoc, factual inquiries"

that would depend largely on the circumstances of each case. 438 U.S. at 124. In doing so, *Penn Central* explained that these fact-based inquiries were to be guided by "several factors," namely (1) "[t]he economic impact of the regulation," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Id.*

"The Court gave no clue as to the meaning of the language used in the formulation of these factors, what sort of evidence would tend to prove their existence, what weight to assign to each of them, and how they translate into a proper inverse condemnation cause of action that, if proved, would entitle the aggrieved plaintiff to relief as a matter of law." Kanner, *supra*, at 690.

Since *Penn Central*, this Court has adopted categorical formulas that deem regulatory actions to be "*per se* takings for Fifth Amendment purposes" where the "government requires an owner to suffer a permanent physical invasion of her property" and where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Lingle*, 544 U.S. at 538 (citation omitted). Outside those contexts, however, this Court continues to insist that "regulatory takings challenges are [to be] governed" by *Penn Central*'s multi-factor test. *Id.*

Penn Central's "indeterminate, inclusive balancing test" provides a "chaotic foundation" for takings jurisprudence. Mark Fenster, *The Stubborn Incoherence of Regulatory Takings*, 28 Stan. Envtl. L.J. 525, 576 (2009). "Under *Penn Central*'s vague, multi-

factor approach one cannot reliably tell what 'the law' is, and how it applies to the controversy at hand without first taking years to let judges have a go at it on an ad hoc basis in each of the many factual variants of regulatory impositions on rights of private property ownership." Kanner, *supra*, at 691. Thus, as the late U.S. Circuit Judge James Oakes explained, *Penn Central* "permits purely subjective results, with the conflicting precedents simply available as makeweights that may fit pre-existing value judgments as to the relative worth of the legislation as opposed to the importance or dollar value of the property rights at stake." James L. Oakes, *'Property Rights' in Constitutional Analysis Today*, 56 Wash. L. Rev. 583, 613 (1981).

As a result, the *Penn Central* test has generated a "regulatory takings jurisprudence" that "has long been infamous for its incoherence." Steven J. Eagle, *Property Tests, Due Process Tests and Regulatory Takings Jurisprudence*, 2007 B.Y.U. L. Rev. 899, 899 (2007) [hereinafter Eagle, *Property Tests*]. "Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence." *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 866 (1987) (Stevens, J., dissenting).

Commentators have therefore repeatedly pointed out that takings jurisprudence under *Penn Central* is "little more than muddled and incoherent, if not incomprehensible, rhetoric." Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Cir. B.J. 677, 678 (2013); *accord, e.g.*, Stephen Durden, *Unprincipled Principles: The Takings Clause Exemplar*, 3 Ala. C.R.

& C.L. L. Rev. 25, 27-28 (2013); Eagle, *Takings Test*, *supra*, at 632; Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in* Lucas v. South Carolina Coastal Council, 26 Loy. L.A. L. Rev. 955, 966 (1993); Fee, *Comparative Right*, *supra*, at 1006; Fenster, *supra*, at 576; R.S. Radford & Luke A. Wake, *Deciphering and Extrapolating: Searching for Sense in* Penn Central, 38 Ecology L.Q. 731, 732 (2011).

As one commentator has observed, "[w]e properly think of law as a set of coherent rules that govern the conduct of people and institutions, that lawyers can explain to clients, and that enable citizens to ascertain which of their expectations are enforceable, and which courses of action on their part are legal *vel non*," and therefore *Penn Central*'s "overtly ad hoc decision-making regime is antithetical to a rule of law." Kanner, *supra*, at 724-25. "[T]o say that 'the law' is unknowable without first engaging in a lengthy and costly multi-year litigation process that leads to ad hoc results arrived at *after the court of last resort first makes 'factual inquiries' years after the trial has been completed*, is to say that there is no law worthy of the name." *Id.* at 725.

That this ad hoc approach has yielded inconsistent and unpredictable results, particularly among the lower courts, has not gone unnoticed by many Justices of this Court. *See, e.g.*, *E. Enters. v. Apfel*, 524 U.S. 498, 540-41 (1998) (Kennedy, J., concurring & dissenting) (with respect to "the regulatory takings concept," "it is fair to say it has proved difficult to explain in theory and to implement in practice," and "[c]ases attempting to decide when a regulation becomes a taking" under *Penn Central*'s test

"are among the most litigated and perplexing in current law"); *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting) (acknowledging the "great uncertainty" generated by "this Court's takings jurisprudence"); *Williamson Cty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 199 n.17 (1985) (Blackmun, J.) (acknowledging that "[t]he attempt to determine when regulation goes so far that it becomes, literally or figuratively, a 'taking'" under this Court's jurisprudence "has been called the 'lawyer's equivalent of the physicist's hunt for the quark'" (citation omitted)).

In short, "regulatory takings law is in disarray" today. Pomeroy, *supra*, at 678. Due to the "vagueness and unpredictability" of *Penn Central*'s factors, takings law "has become an economic paradise for specialized lawyers, a burden on the judiciary, as well as an indirect impediment to would-be home builders, and an economic disaster for would-be home buyers and for society at large." Kanner, *supra*, at 681 (footnote omitted); *see also* Radford & Wake, *supra*, at 732.

Given "the absence of discernable rules" in *Penn Central*, lawyers advising both regulators and landowners "are unable to ascertain which facts of the controversy will prove to be the operative, much less decisive, [considerations] nor the prospective likelihood of litigational success or failure." Kanner, *supra*, at 692; *accord* Radford & Wake, *supra*, at 736. This has "encouraged regulators to pursue policies that have sharply reduced the supply of housing and are implicated in the ongoing, mind-boggling escalation in home prices," Kanner, *supra*, at 681, to name just one economic consequence of the ongoing confusion.

Moreover, *Penn Central*'s "fuzzy" multi-factor test "encourages litigation," generating a "climate of uncertainty" that too often prompts the government to "resist even meritorious claims, playing the odds and counting on the courts' propensity to rule in their favor for sometimes unarticulated, ideological, or fiscal reasons." *Id.* at 682, 692.

As explained below, the Chamber urges the Court to resist the temptation to define the relevant parcel here in the same ad hoc fashion that it treats the *Penn Central* factors themselves. Instead, the Court should adopt a clear definition of the relevant parcel for the category of cases in which property owners maintain that regulations took a tract of land.

II. IN THE ABSENCE OF MEANINGFUL GUIDANCE FROM THIS COURT ABOUT HOW TO DEFINE THE PARCEL AS A WHOLE, LOWER COURTS HAVE OFTEN UTILIZED AD HOC FACTUAL CONSIDERATIONS TO INCONSISTENTLY DEFINE THE RELEVANT PARCEL.

Since *Penn Central* never explained precisely what its multiple factors meant or how they were supposed to guide the ad hoc factual inquiries that *Penn Central* called for, this Court, lower courts, and litigants have struggled to impart meaningful substance to *Penn Central*'s balancing test. *See* Kanner, *supra*, at 681-82, 690. Among the most confounding and important questions fostered by *Penn Central*'s test is how to define the so-called "parcel as a whole."

In *Penn Central*, the property owners argued that a regulatory law went too far, and therefore amounted to a taking under the Fifth Amendment, because it restricted their "air rights" above their property. 438 U.S. at 128-30. In effect, the owners argued that they could "establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development," an argument this Court deemed "untenable." *Id.* at 130. According to *Penn Central*, "'Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* Instead, the *Penn Central* factors focus on an owner's "rights in the parcel as a whole." *Id.* at 130-31.

As the dissent prophesied in *Penn Central*, the definition of the relevant parcel has since become the linchpin to the *Penn Central* multi-factor test. *See id.* at 149 n.13 (Rehnquist, J., dissenting) (explaining that courts would need to "define the particular property unit that should be examined"); *see also Keystone*, 480 U.S. at 514-15 (Rehnquist, C.J., dissenting) ("The need to consider the effect of regulation on some identifiable segment of property [under *Penn Central*] makes all important the admittedly difficult task of defining the relevant parcel."); Epstein, *Ebbs and Flows*, *supra*, at 22.

This is so because one of the "critical" threshold questions that must be answered before applying the *Penn Central* factors is "how to define the unit of property" against which the factors are meant to be measured. *Keystone*, 480 U.S. at 497; *accord, e.g.*,

Giovanella v. Conservation Comm'n of Ashland, 447 Mass. 720, 725, 857 N.E.2d 451, 456 (2006); *Dunes W. Golf Club, LLC v. Town of Mount Pleasant*, 401 S.C. 280, 305, 737 S.E.2d 601, 614 (2013).

Much as *Penn Central* declined to explain the meaning of its factors, *Penn Central* likewise did not decide "how to determine the relevant parcel of land" against which its factors were to be measured. Fee, *Unearthing the Denominator*, *supra*, at 1535-36. And in the decades since, the Court "has provided only minimal guidance" on this issue, "[r]epeated[ly] admoni[shing] [lower courts] to use the 'parcel as a whole'" while "do[ing] little to define the contours of that whole parcel in any particular case." *Giovanella*, 447 Mass. at 726, 857 N.E.2d at 456. As a result, the vital question of what constitutes the parcel as a whole has remained a "difficult, persisting question" to this day, *Palazzolo*, 533 U.S. at 631, in no small measure because "the rhetorical force" of this Court's prior precedent has been far "greater than its precision" on this issue, with the resulting "uncertainty" producing "inconsistent pronouncements by the Court," *Lucas*, 505 U.S. at 1016 n.7. Indeed, the problem of defining the relevant parcel has become a "conceptual black hole." *Dunes W. Golf Club, LLC*, 401 S.C. at 306, 737 S.E.2d at 615 (citation omitted); *accord* Fee, *Comparative Right*, *supra*, at 1032.

Moreover, in the absence of meaningful guidance from this Court on the definition of the relevant parcel, lower courts have "used a variety of fact-specific and often inconsistent methods to define the relevant parcel," especially in cases (like the one here) where property owners have claimed that government

regulations took physical tracts of land. Fee, *Unearthing the Denominator*, *supra*, at 1545-49; *see also* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel as a Whole*, 36 Vt. L. Rev. 549, 564 (2012); Marc R. Lisker, *Regulatory Takings and the Denominator Problem*, 27 Rutgers L.J. 663, 668 (1996). This ad hoc approach to defining the parcel as a whole is unsurprising given that the concept of such a parcel derives from, and is meant to influence, the equally ad hoc, fact-specific *Penn Central* factors. *See* Eagle, *Takings Test*, *supra*, at 632.

The Court now has an opportunity to define the "'parcel as a whole' concept" in the commonly-recurring context raised by this case, Pet. i, and to thereby finally settle the "persisting question of what is the proper denominator in the takings fraction," *Palazzolo*, 533 U.S. at 631, in the setting of physical tracts of land where the question arises most often and spawns the greatest division among lower courts.

III. THE RELEVANT PARCEL SHOULD BE DEFINED BY AN OBJECTIVE ASSESSMENT OF WHETHER THE TRACT OF LAND HAS INDEPENDENT ECONOMIC VIABILITY.

The Court should adopt an objective, clear definition for what constitutes the relevant parcel where, as here, property owners are subject to a partial regulatory taking of a physical tract of land. Such a categorical approach is rooted in the historical safeguards for these traditional property rights that were recorded as part of the constitutional protection afforded by the Fifth Amendment. *See Lucas*, 505 U.S.

at 1016 n.7, 1027-28. A categorical approach also finds support in recent decisions from this Court that have embraced less ad hoc tests to decide challenges to regulations that infringe on physical tracts of land. *See Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511, 518 (2012); *Lucas*, 505 U.S. 1014-19, 1027-32; *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 427-36 (1982); *see also Tahoe-Sierra*, 535 U.S. at 330-32 (fee simple estate is a real property interest defined by objective geographic considerations). An objective definition for the relevant parcel where the parcel in question consists of a fee simple estate in land would better ensure that traditional property rights in physical tracts of land continue to receive the protection they have long enjoyed under the law.

A. The "common ownership" test to determine the relevant parcel, as adopted by the Wisconsin Court of Appeals, results in the arbitrary and unpredictable extinction of property rights.

The ordinance in question here prevents petitioners from selling or developing a physical lot of land. *See* Pet. App. B-9. That constitutes a takings challenge to a regulation that governs the fee simple estate in land. *See Tahoe-Sierra*, 535 U.S. at 331-32 ("a permanent deprivation of the owner's use of the entire area [of a fee simple estate] is a taking of 'the parcel as a whole,' whereas a temporary restriction" on development during a particular time period is not the whole parcel); *Palazzolo*, 533 U.S. at 627-28 (stripping successive landowner's right to transfer his interest in a physical tract of land purchased by a prior owner "would work a critical alteration to the nature of

property" since the "right to transfer [an] interest in land is a defining characteristic of the fee simple estate" (citation omitted)). The "fee simple interest" in a physical "tract" of land "is an estate with a rich tradition of protection at common law"—one that American property owners have long been familiar with and the protection of which was part of the "historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Lucas*, 505 U.S. at 1016 n.7, 1027-28.

In defining the relevant parcel and deciding whether the ordinance at issue amounted to a regulatory taking, the Court of Appeals of Wisconsin, conducting the "ad hoc factual, traditional takings inquiry" called for by a "partial taking[s]" analysis, concluded that the relevant parcel in this case consisted of both Lots E and F and that no partial taking occurred. Pet. App. A-9 to A-11, A-14 to A-18. The court arrived at this conclusion by focusing on what it considered to be a key fact: petitioners' common ownership of these two adjacent lots. *Id.* Other courts, in similar circumstances, have reached different results by looking to equally ad hoc factual considerations. Pet. 17-20 (collecting a sample of lower courts' inconsistent approaches to defining the relevant parcel in cases where tracts of land are at issue); *see also* John E. Fee, *Of Parcels and Property, in* Taking Sides on Takings Issues 101, 110-16 (Thomas E. Roberts, ed., 2000) [hereinafter Fee, *Of Parcels and Property*]; Lisker, *supra*, at 667-68, 706-19; Fee, *Unearthing the Denominator*, *supra*, at 1545-57.

Defining the relevant parcel based on common ownership of contiguous tracts of land, as the Court of

Appeals did here, "does little to serve the policies underlying the Takings Clause" because, "[a]s a standard of just compensation, it is simply illogical." Fee, *Of Parcels and Property*, *supra*, at 112. Simply put, this common ownership criterion "results in arbitrary treatment of landowners and harmful distortions of real estate markets." *Id.*

As one commentator posits by way of example to demonstrate the common ownership criterion's arbitrary nature, "suppose that five individuals each own equally sized beachfront lots. In addition, they each own private homes. But whereas the first four owners live across town, the fifth has her home on a lot directly behind her beach lot." Fee, *Unearthing the Denominator*, *supra*, at 1552. "If a regulation were enacted restricting all viable use of the beachfront property, the first four would be compensated while the fifth might not," since the first four do not commonly own two adjacent lots of land whereas the fifth owner does. *Id.* "Focusing on contiguous common ownership therefore makes takings cases turn upon the randomness of whether real estate interests are contiguous, or instead on the cleverness of landowners in keeping real estate interests sufficiently fragmented." Fee, *Of Parcels and Property*, *supra*, at 113; *see also* Fee, *Comparative Right*, *supra*, at 1032 ("[T]he quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part.").

This example is not merely an academic hypothetical. It is what happened in this lawsuit and what occurs all too often in takings cases involving tracts of land. For decades, Lots E and F were not

under common ownership. Pet. Br. 3-4. But, in the 1990s, both lots were transferred to petitioners, resulting in petitioners becoming the common owners of these two contiguous lots. Pet. Br. 4. Under the Court of Appeals' common ownership rationale here, the two lots were distinct parcels of property for decades but the mere happenstance of their having been transferred to common owners in the 1990s transformed the two lots overnight into a single, merged parcel. *See* Pet. App. A-17. Property rights should not evaporate on such an arbitrary whim.

B. The relevant parcel of land here should be defined based on an objective test that examines the land's independent economic viability.

Rather than countenance the type of arbitrary and discriminatory ad hoc criteria for defining relevant parcels like the common ownership standard invoked by the Court of Appeals here—criteria that are wholly inconsistent with the protection the law has generally afforded to traditional fee simple interests in tracts of land—the definition of the relevant parcel in cases involving physical tracts of land should objectively focus on "the property itself and its relation to the community." Fee, *Of Parcels and Property*, *supra*, at 116; *see also* Eagle, *Property Tests*, *supra*, at 941 ("What is needed is an objective definition of the property right; one that neither favors, nor readily could be manipulated by, either owner or government actor.").

Specifically, "any identifiable segment of land" should be considered the relevant parcel "if prior to

regulation it could have been put to at least one economically viable use," independent of any adjacent tracts. Fee, *Unearthing the Denominator*, *supra*, at 1557.

If the tract of land identified by the property owner meets this standard, it serves as the relevant parcel. *Id.*; *accord* Fee, *Of Parcels and Property*, *supra*, at 117 ("[A] whole parcel is one that is large enough that even if it were the owner's only real property, it would be feasible and profitable to use for some independent enterprise."). "Only by focusing on the land itself, rather than on the paper transactions of owners and government, can disparate treatment of landowners be avoided." Fee, *Of Parcels and Property*, *supra*, at 117.

At a minimum, this Court should make clear that adjoining tracts of land under common ownership are distinct parcels where they have been treated as distinct tracts of land by the property owners, since this approach best conforms to the Court's history of focusing on landowners' understanding of their property rights. *See Lucas*, 505 U.S. at 1027 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *see also id.* at 1035 (Kennedy, J., concurring) (Takings Clause "protects private expectations to ensure private investment"); *Lost Tree Vill. Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) ("[E]ven when contiguous land is purchased in a single transaction, the relevant parcel may be a subset of the original purchase where the owner

develops distinct parcels at different times and treats the parcels as distinct economic units."), *petition for cert. filed* (U.S. Mar. 22, 2016) (No. 15-1192).

CONCLUSION

The judgment of the Court of Appeals of Wisconsin should be reversed.

Respectfully submitted,

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